UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

C & K INSULATION, INC.

and **Case No. 3-CA-24151**

HEAT AND FROST INSULATORS
AND ASBESTOS WORKERS LOCAL #38

Robert Ellison, Esq., Counsel for the General Counsel.
Joseph Steflik, Jr., Esq., Coughlin & Gerhart, LLP., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 23 and 24, 2003 in Binghamton, New York. The Complaint herein, which issued on April 15, 2003[1], and was based upon an unfair labor practice charge and an amended charge that were filed on March 19 and April 8 by Heat and Frost Insulators and Asbestos Workers Local # 38, herein called the Union, alleges that since on about January 7, C & K Insulation, Inc., herein called the Respondent, refused to consider for hire and refused to hire employee-applicants Paul Raymond Johnson, Keith Wagner and Thomas Davitt because of their Union and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act.[2]

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

This case involves the alleged refusal to consider for hire, and to hire, Johnson, Wagner and Davitt beginning on January 7. Johnson has been the president and organizer for the Union, a full-time paid position; Wagner is a regional organizer for the Mid Atlantic States' Conference for the International Union and Davitt is employed by Local 30 of the same union as

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[1] Unless indicated otherwise, all dates referred to herein relate to the year 2003.

[2] Counsel for the General Counsel's unopposed Motion to Correct Transcript is hereby granted.

an organizer, both full-time paid positions. Johnson and Davitt's offices are located about an hour's drive from Binghamton, where the Respondent is located. Wagner lives in Maryland, about 260 miles from Binghamton.

On January 6, Johnson went to a job site at SUNY Binghamton to check on some insulation work that was being performed there. While there he met Art Ingraham and Jeremy Wallace, who were working at the job site, and they told him that they were employed by M&G, but that they had recently left their employment with the Respondent and, therefore, the Respondent might be in the need of employees. Johnson called Wagner and Davitt, told them of the situation, and they met at the SUNY job site the following day. After again speaking to Art Ingraham and Wallace, they decided to go to the Respondent's main office, which is also the home of the Respondent's owner, Chester Ingraham, herein called Ingraham, to apply for employment with the Respondent as overt salts.

They arrived at the Respondent's facility late in the afternoon on January 7. Johnson was wearing a Union jacket with the Union insignia on the back and a Union patch on the front. Davitt was wearing a local 30 hat and Wagner was wearing a union building trades' jacket. They knocked on the front door and were met by Carolynn Ingraham, Ingraham's wife, herein called Carolynn, who is an estimator for the Respondent and also performs some office work. Johnson testified that they told her that they wanted to apply for work and she said that they were not a union company. They said that didn't matter, but they would like to work for the company and she gave them employment applications, which they each completed. They asked about the work situation, "and she made the comment that there was work." When they asked if the company was hiring at the time, she said that she didn't know. In addition, "she did allude to the fact or make the comment that there was quite a bit of work coming up in the future here and that they might possibly be looking..." While they were completing the applications, she walked out of the room and, a short time later, Ingraham came into the room and introduced himself. Davitt asked him how long their applications would be valid, and he said that they would be kept for a year. Ingraham was asked about work, and he said there wasn't much work available. They asked him about wages, and he said the starting hourly rate would be $10.50 on private jobs and the "full amount" for prevailing rate work. They told him that they had met two of his former employees, and Ingraham said that if they hadn't left he would have had to lay them off because work was slow. They handed in their applications and left. Johnson testified that if he had been offered employment on January 7, or between January 7 and May 22, when he was offered employment, he would have accepted it.

There was a substantial amount of testimony from Johnson, Davitt and Wagner, principally during their cross examination, about salting and salting techniques, and whether they were really interested in working for the Respondent or whether they applied solely to organize the Respondent's employees. Johnson's testimony in this area (and to a lesser degree Davitt and Wagner) was not very credible. Initially he testified that his purpose in applying to work for the Respondent was because, "I wanted a job." When asked if that was the only purpose, he testified, "And organize the company." He later testified, rather sarcastically, that another reason that he applied to work for the Respondent was because his wife wanted him to buy her a van, yet he never applied to work for a union contractor, which obviously would have paid a higher hourly wage. There was similar testimony from Davitt and Wagner. None of this will be discussed further because under Board and Court law, it is irrelevant and no defense to the allegations herein. Since the Supreme Court's decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the law has been clear that paid union organizers, acting as salts in applying for employment, are employees within the meaning of Section 2(3) of the Act. Further, Johnson, Wagner and Davitt did not act in a "disruptive, intimidating and disrespectful" manner on January 7, *Exterior Systems, Inc.*, 338 NLRB No. 82 (2002), nor did they convince any of the

Respondent's employees to leave its employ for a union job ("stripping"), *Abell Engineering & Manufacturing, Inc.*, 338 NLRB No. 42 (2002). Therefore, the testimony on this subject will not be discussed further nor will it be considered.

Wagner testified that Carolynn let them in to the office and they said that they were insulators looking for work and asked for employment applications. At the time he was wearing a jacket with a union building trades logo. She gave them applications which they proceeded to fill out. She told them that they were not a union shop and they said that wasn't a problem, they were there to work. They asked if the company was hiring and she said that she didn't know. They asked about the workload, and she said that they were pretty busy with a decent backlog of work. They completed the applications and returned them to Carolynn. Shortly thereafter, Ingraham arrived and they asked if he was hiring, and he said that he was not, "in fact, things were slowing down." They asked about wages, and Ingraham mentioned a figure of about $10.50 an hour. They said that they were worth more than that, but they would be willing to work for whatever he was offering and would prove themselves. Davitt asked how long the applications would be kept on file, because they said forty five days, and Ingraham said that they would be maintained for a year. Wagner asked if he had a lot of applications on file, and he said that he didn't. He testified that if he had been offered employment by the Respondent at that time or thereafter, he would have accepted the job offer.

Davitt testified that Carolynn was in the office when they arrived on January 7. He was wearing a hat with the international union name and logo on it. They asked if they could have employment applications, and she gave them the applications. She said, "...they were going to be busy, you know, had a lot of work and they'd be looking for some people." She also told them that the Respondent was not a union company. He saw that while they were completing the applications, she was making a telephone call and, shortly thereafter, Ingraham arrived. They asked him how the work was, and he said that the work was slow, that he was probably going to be laying people off. When they told him that they met his two former employees now working for M&G, Ingraham said that he was happy that they had left, otherwise he would have had to lay them off. Johnson asked what a mechanic with fifteen years experience would earn, and he said between $10 and $11 an hour. Davitt asked how long their applications would be held and Ingraham said that they would be held indefinitely. He testified that if he had been offered employment by the Respondent in January, February or March, he would have accepted the job.

Ingraham testified that he returned to the office when he received a telephone call from Carolynn on January 7 that Johnson, Davitt and Wagner were there. While there, one of them commented that three of his employees had either quit or were about to quit, and he responded that they did him a favor because he might have had to lay them off if they didn't quit because the work was slowing down. Of the three, Art Ingraham left in October or November and Jeremy and Todd Wallace left the last week in December 2002 or the first week in January. All went to work for M&G. Before Johnson, Wagner and Davitt left, they gave Ingraham their employment applications; at the time, he had about three other applications on file.

Johnson's application[3] states that he completed the four year apprenticeship program in 1996 and lists his "Work Experience" from June 1995 to March 2000 when he was employed by Parson Insulation; from April 2000 to June 2001, by Superior Insulation, and since June 2001 he has been president and organizer of the Union. Wagner's application also states that he

[3] The Applications for Employment used by the Respondent are of a "generic" nature, without the Respondent's name printed therein, and are probably available at stationary stores.

completed a four year apprenticeship program, and that he was employed in the industry from 1976 to 1995 ("Listing of contractors available on request") and that since 1995 he has been an organizer for the union. Davitt's application states that he has been an apprentice instructor for ten years and was employed in the industry from 1972 through December 1996 and in January 1997 he became business manager for Local 30 and teaches at the apprentice school. He became a journeyman in 1976. Ingraham testified that he had some doubts about their abilities because of the gaps in their work records: "Mr. Davitt had been better than six years since he worked with the tools. Mr. Wagner in excess of eight years working with the tools. Mr. Johnson...was the most recent one."

Not having heard from Ingraham, Johnson and Wagner returned to the Respondent's facility on February 4. Johnson testified that Wagner did all the talking for him. He asked about their applications and Ingraham "made reference to us talking bad about him." He said that they were "running him down on the job." Ingraham told them "that we're not welcome on any jobs and told us that he told his men that if we ever show up on another job again that they are to escort us off and call the police..." Wagner asked him if he had hired anybody and he said that he didn't hire anybody and wasn't planning to hire anybody. Ingraham asked Wagner why they were picking on him, and Wagner said that they weren't picking on him, that they wanted to work for him. Johnson testified that he does not recall whether Wagner accused Ingraham of not paying prevailing rate wages on public jobs at this meeting and that he does not believe that Wagner threatened to have the Respondent investigated regarding prevailing rate violations, although he does remember Wagner saying, "So, you wouldn't mind being investigated." In addition, Johnson filed prevailing wage rate violation claims with a government agency after this meeting, but he could not recollect how many complaints he filed. By letter to Johnson dated May 22, the Respondent offered him "unconditional employment." The letter gave him until May 29 to respond. Because he couldn't begin by that day, Ingraham gave him additional time, and he began working for the Respondent on June 4 and, at the time of the hearing, was still employed by the Respondent.

Wagner testified that as they had not received any response from the Respondent about their employment applications, they returned to its facility on about February 4. They asked about their applications, and Ingraham and Carolynn's "temperament became a little hostile, they wanted to know why we were picking on their company." Wagner said that they weren't picking on them, they just wanted to ask about their applications. He asked Ingraham if he had hired anybody, and he said no. He testified that he did not accuse Ingraham of failing to pay proper prevailing wage rates; he did question Ingraham as to whether he was paying the proper rates. Like Johnson, he received an unconditional offer of employment from the Respondent dated May 22. He did not accept, nor did he respond, because he was involved in other campaigns at the time. Davitt was also sent an unconditional offer of employment on May 22, although his testimony is somewhat confused on this point. He, apparently, began working for the Respondent on June 2, worked about a day or two, and went "on strike." About a week prior to the hearing herein, he went to the Respondent's office where he allegedly made an unconditional offer to return to work. He testified that Ingraham told him that if he ever returned, he would contact the sheriff.

Ingraham testified that when Johnson and Wagner returned to his office in February, Wagner did most of the talking. He asked if they had done any hiring, and Ingraham said no. Wagner said that he just hired some people, and Ingraham said that he hired an apprentice. Wagner was getting irate, shook his finger under Ingraham's nose and said that he wasn't paying premium rates, and how would he like to be investigated. Ingraham said that he wasn't doing anything wrong, and that they could investigate him if they wanted to. Ingraham said that it was best if they left, and that they come return at a later date. He testified that his failure to

offer employment to Johnson, Wagner and Davitt between January 7 and May 22 was unconnected to their Union positions.

Scott Disbrow has been performing insulation work for approximately twenty years and has been a member of Local 30 for two years. He lives in Elmira, New York, about an hour drive from the Respondent's facility. He testified that his last employment in the industry was with an employer named Atlantic, a Union contractor. That employment ended just before Christmas. In late February Davitt, his business agent, told him that the Respondent was hiring and he could apply to work there. At the beginning of March, he called the Respondent's office and spoke to Carolynn, who said that they were looking for experienced help and were accepting applications. He told Carolynn that he worked with his son at a previous job and she said that his son could submit an application as well. Disbrow went to the Respondent's facility on about March 7 with his son Thomas. At that time he met with Ingraham and Carolynn and both he and his son completed employment applications, but neither was given a copy of their application. His application is dated March 7 and lists two prior employers, one from 1983 to July 1999 and the other from January 2000 to July 2002. The application makes no mention of unions. He testified that he did not list his employment with Atlantic, "To show that it wasn't union tied" although neither Davitt nor any other Union representative told him to omit any reference to union employment.

Johnson testified that on about February 26 he spoke to Disbrow about applying for work as a salt with the Respondent. Disbrow had "concerns" about doing it, but Johnson told him that if he was hired by the Respondent it would help prove that they were discriminating against Johnson, Wagner and Davitt. On March 7, he and Wagner met with Disbrow and Thomas and told them what to do and what to say when they applied for work with the Respondent. They told him to list only non-union employers and to "stretch the dates of the employment to create less gaps" as much as possible in the application. Since Disbrow had twenty years experience in the industry, he had good credentials to apply to work for the Respondent.

Disbrow testified that he received a telephone call from Carolynn on March 10. She told him that Ingraham looked over his application and wanted him to come to the facility for an interview. He and Thomas went to the Respondent's facility on the following morning. Ingraham asked him some questions about his experience and said that they needed some help and would hire Disbrow at a starting salary of $12 an hour and Thomas at $8 an hour, "and we could work as a team." Disbrow said that he was worth more than $12 an hour and Ingraham said that he would reevaluate him and, in addition, he had some prevailing rate work coming up. Ingraham wanted him to begin working "right away", but Disbrow told him that his sister, who had three children, had recently died and he had to go to court and care for the children. Disbrow called Ingraham on March 21 to tell him that they were available, and he and Thomas began working for the Respondent on March 24. Ingraham testified that he hired Disbrow principally because of his experience in the trade and Thomas because he thought it would work out well for him to work with his father. He made the decision to hire them about a week before they started because work was starting to pick up at that time.

Disbrow testified further that in the March 21 telephone call with Ingraham, Ingraham told him that "he'd like to put us to work but he had problems with the union, wanted to know if me and my son could redo our applications." He told Disbrow that the union people had filled out applications before he did and he wanted to show that Disbrow's application was received first. Ingraham told him to come to the office on March 24, redo the application, and go right to work from there. Disbrow and Thomas went to the office on that morning and met with Ingraham and Carolynn. Their March 7 applications were on the table with another set of applications to fill out. Ingraham told them to copy what was contained in the March 7 application, but date it

December 17 and that doing so "would help him from getting involved in the union." After completing the application which he dated December 17, when nobody was looking, Disbrow took the two applications dated March 7 from the table in front of him. He had not previously been given those applications, and "I knew what I was getting into and I just kept it for, basically, today." After completing the applications, Disbrow and Thomas left to begin their first day of employment for the Respondent.

Ingraham testified that the only time that Disbrow and Thomas applied for employment with the Respondent was in mid-December 2002. He didn't hire them at that time because: "I didn't need anybody at that time." He hired them in late March because work started to pick up at about that time. He hired Disbrow over Johnson, Wagner and Davitt because he had been performing insulation work continuously over twenty years, while Johnson, Wagner and Davitt hadn't been performing this work recently, and he hired Thomas because he worked with his father. He did not refuse to hire or consider Johnson, Wagner and Davitt for employment because of their Union positions. He testified that prior to the day before the hearing herein, he had never seen the Employment Applications of Disbrow and Thomas dated March 7 and never asked them to complete a second application and change the date. Carolynn testified that she first met Disbrow and Thomas on December 17 when they completed Employment Applications for the Respondent; she had never previously seen their Employment Applications dated March 7, a Friday. She testified that she was not present in the office on March 7 because on the first Friday of every month she takes her elderly mother shopping. Her mother receives her pension money by the third day of the month, so she takes her shopping on the first Friday of the month, and that is where she was on March 7.

In order to support the authenticity of the December 17 Employment Applications, Counsel for the General Counsel produced testimony and witnesses to establish that Disbrow and Thomas were working that day, at a location distant from the Respondent's office. Disbrow testified that he was performing work for Atlantic at a psychiatric clinic in Ogdensburg, New York, about a five hour drive from his home in Elmira, New York, the week of December 16. They left early in the morning on Monday, December 16, but were delayed or prevented from getting to work that day because of a bad snow storm. They stayed at a nearby motel beginning that night, and worked the rest of the week at the Ogdensburg facility. Richard Mullen is employed by Atlantic Contractors as a branch manager. The purpose of his testimony was to identify a certain payroll record of Atlantic, which he did. This document states that Disbrow did not work on December 16, but worked eight hours for Atlantic on December 17 and worked from December 18 through December 20 as well. Also received into evidence was a calendar for December 2002 maintained by Disbrow and his wife. Written in pencil by his wife on each day from December 16 through December 20 was "Hon [her nickname for him] and Tom Ogdensburg." Ogdensburg is located about two hundred miles from Binghamton.

Thomas ceased working for the Respondent after about a week. The Union sent Ingraham a letter dated April 13 stating, *inter alia*: "Please be advised that the International Association of Heat and Frost Insulators and Asbestos Workers Union represent your employees Scott and Tom Disbrow. They will be engaged in organizing activities within your company." Shortly after this letter was sent, he ceased working for the Respondent, and has been employed elsewhere since that time.

Ingraham testified that in the eleven years that Respondent has been in operation, his usual complement of employees was between eight and twelve, although it varied between the slow Winter season and the busier Spring and Summer; work usually begins to improve in about March and April. During that period, he has attempted to avoid laying off employees as much as possible but, at times, he had to do it, but would offer those employees recall when work picked

up. Over the years most of the employees that he hired were either family members or friends of family members. On about January 5 or 6 he placed an ad for an insulation apprentice on the State of New York Department of Labor website.[4] This ad ran from January 6 through January 24. The person who responded to this ad was Ken Moseman, who completed his Employment Application on January 24 and was hired on January 27. Moseman had no previous experience performing insulation work, but one factor influencing his hiring was that Carolynn knew him when he was growing up. The fact that he didn't have any insulation experience did not prevent Ingraham from hiring him because he enjoys training employees in insulation work. Ingraham testified that he did not consider Johnson, Wagner or Davitt for this position because they were journeymen and the job was for an apprentice who would go through the apprentice training program that Respondent was a member of. It is his understanding that a journeyman is not eligible for this program.

Duane Harty completed a Application for Employment with the Respondent on either January 2 or January 12.[5] Ingraham testified that he learned of Harty's interest in employment from his son-in-law, Robert Kelly, who was a friend of Harty. Harty had no experience in insulation work, but Ingraham testified that the main factor in hiring Harty was his two year's experience in sheet metal work, which is related to insulation work. His most previous employment was as a cashier at a grocery store. Harty was hired on February 3 because the company had a large amount of exterior duct work to perform, and his sheet metal experience would be valuable. Ingraham testified that Harty's sheet metal work experience was the reason he was chosen for employment over Johnson, Wagner and Davitt. Harty worked for the Respondent until March 7 when he quit to return to work at the sheet metal employer with whom he had previously been employed. James Jardine completed an Application for Employment with the Respondent on March 5; he was also a friend of Kelly. Jardine had no prior experience in the field and that was a factor in deciding to hire him, "because I wanted to train him myself." He began working for the Respondent on March 11 and was terminated on May 2 because of problems that he had which resulted in his being absent from work. After Jardine, Ingraham hired Disbrow and Thomas and offered employment to Johnson, Wagner and Davitt.

On January 7, the Respondent employed the following individuals to perform insulation work: Kevin Ingraham, his son, had previously worked with Ingraham at A&D for eight years and has been employed at the Respondent since 1992. Edward Staff, who has also been employed by the Respondent since 1992, and worked with Ingraham for A&D with for about ten years. Matt LaMere, Ingraham's son-in-law, worked for A&D for about six months before being hired by the Respondent in 1993. David Gould, Ingraham's nephew, worked for A&D for about eight years before being hired by the Respondent in 1994. Pat Murray, Carolynn's cousin, had about two year's experience in insulation work when he was hired by the Respondent in 2001, and Robert Kelly, who was also hired in 2001. Joe Araya, who also worked with Ingraham at A&D, worked for the Respondent from October 2002 to July 2003, when he resigned his employment.

Ingraham testified about the work being performed by the Respondent on about January 7. Chenango Valley School District job, in progress for about a year, required from one to three employees two to three days a week although, at times, nobody was needed. A Proctor and Gamble job in Norwich, New York, about forty five miles from Binghamton, was active from

[4] The confirmation of this ad from the Department of Labor states that the job order was received from the Respondent on January 16.

[5] On the first page of a copy of the application there appears to be a mark in front of the "2" and on the last page Harty dated it January 12. January 2 was a Thursday; January 12 was a Sunday.

September through December 2002 with one or two employees. A PIT job in Endicott, New York, adjacent to Binghamton, that is ongoing: "You might have a guy in there for two days this week. You might not have anybody in there for two weeks." The Towanda Hospital job about thirty five miles from Binghamton, which commenced in about September 2002 and was completed in about July, required employees from two to five days a week. The Warwick High School job, about a three hour drive from Binghamton, commenced in about April 2002 and is ongoing. Blue Mountain Elementary School, about a two hour drive from Binghamton, has been active since mid-2002 and employs one or two people about two days a week. The Clara Welsh Retirement Home in Cooperstown, New York, about an hour drive from Binghamton, ran from either July to November 2002 or from November 2002 to about April, using two to four employees three to four days a week. The John Beck Elementary School in Levitz, Pennsylvania commenced in the Summer of 2002 and was ongoing. The number of individuals he employed at the site is unclear. The final work site testified to was an Extended Stay Hotel in Plymouth Meeting, Pennsylvania, east of Philadelphia, which commenced in the Fall of 2002 and was completed in about July, required one employees about two days a week.

IV. Analysis

Counsel agree that *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000) is controlling herein. In that case, the Board stated:

> To establish a discriminatory refusal to hire, the General Counsel must...[under the *Wright* Line burdens] first show the following at the hearing on the merits: (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In *FES*, at 15, the Board set forth the principals regarding an alleged refusal to consider violation:

> the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The major credibility issue herein relates to Disbrow's testimony regarding backdating his Application for Employment to December 17. This is a difficult issue because I, initially, found Carolynn's testimony on this subject both personal and credible. However, after a total review of the record herein I credit Disbrow's testimony regarding the two applications. I found Disbrow to be a credible and believable witness. Although his testimony may have been incorrect on some minor issues (whether the Union agents told him to "touch up" dates on his Employment Application and who asked him to act as a salt) he appeared to be attempting to testify in an honest and open manner. In addition, Atlantic's payroll records support his testimony that he worked eight hours in Ogdensburg, about two hundred miles from the Respondent's facility, on December 17, as well as the rest of that week. Finally, the unfair labor

practice charge was mailed to the Respondent on March 20 and was probably received by it the following day, the day that Disbrow testified Ingraham asked him to come in to backdate his Employment Application. The one suspicious factor on this issue is that the Respondent's Application for Employment is of a generic type that can probably be purchased at area stationary stores. Therefore, the Union, together with Disbrow, could have purchased such an application and created a fictitious application dated March 7. However, for the reasons stated above, I credit Disbrow's testimony and find that on March 21 Ingraham asked him to come to the office and backdate his Application for Employment to December 17, which he did.

I find that Counsel for the General Counsel has satisfied all of the requirements set forth in *FES*. From November 2002 to January the Respondent lost three experienced employees, and from January through March it hired five employees, Moseman, Harty, Jardine and Disbrow and Thomas. Further, Ingraham never satisfactorily explained why he did not hire Johnson, Wagner or Davitt in January for the apprenticeship position for which it hired Moseman, even if they are journeymen, nor did he satisfactorily explain why he didn't hire them in place of Harty, Jardine, Disbrow and Thomas. The second requirement of *FES* is clearly satisfied. Johnson, Wagner and Davitt are each journeymen with many years experience in the industry. That there are gaps in the experience because of their present union positions is no defense herein as the evidence indicates that most of the Respondent's recent hires had little, or no experience, in the industry. Respondent could not, in good faith, argue that they did not have the required training or experience to be hired. The final requirement, that Union animus contributed to the Respondent's refusal to offer them employment until May 22 is also established. There could be no other reason for Ingraham's initial failure to offer them employment. As stated above, they were experienced, and on January 7 they told Ingraham that they would be willing to work for whatever wage rate he was offering. More directly related to this requirement is Disbrow's credited testimony that on March 21, Ingraham asked him to come to the office to backdate his Application for Employment because of problems that he was having with the Union. This establishes Union animus. *Pan American Electric, Inc.*, 328 NLRB 54, 55 (1999); *Caruso Electric Corporation*, 332 NLRB 519 (2000). I further find a total lack of credible evidence to establish the Respondent's burden, that it would not have initially hired Johnson, Wagner and Davitt even absent their union affiliation. He hired five employees before offering employment to them even though they had substantially more experience in the field than all except one, Disbrow. I therefore find that by failing to offer employment to Johnson, Wagner and Davitt from January 7 to May 22, because of their union affiliation, the Respondent violated Section 8(a)(1)(3) of the Act.

It is also alleged that the Respondent unlawfully failed to consider them for employment. For the reasons stated above, I find that Counsel for the General Counsel has satisfied the burdens set forth in *FES,* and that the Respondent has not satisfied its burden of establishing that it would not have considered them even absent their Union affiliation. I therefore find that from January 7 to May 22, the Respondent failed to consider for employment Johnson, Wagner and Davitt because of their union affiliation, in violation of Section 8(a)(1)(3) of the Act.

Conclusions of Law

1. At all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. From about January 7, 2003 to about May 22, 2003, the Respondent violated Section

8(a)(1)(3) of the Act by refusing to consider for employment, and by refusing to hire, Paul Johnson, Keith Wagner and Thomas Davitt.

The Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1)(3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. However, as the Respondent made valid offers of employment to Johnson, Wagner and Davitt on May 22, 2003, I find no reason to recommend that the Respondent be ordered to do so again, and I therefore reject Counsel for the General Counsel's argument to this effect at footnote 17 of his brief. However, I will recommend that the Respondent be ordered to make whole Johnson, Wagner and Davitt for any loss of earnings and other benefits that they suffered as a result of the Respondent's failure to consider them for employment, or employ them, for the period from January 7, 2003 to May 22, 2003, when the Respondent offered them employment, computed on a quarterly basis, less any interim earnings as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under FES, this amount will depend upon the number of employees that the Respondent employed during this backpay period, which was established at the hearing, together with the pay rate of these employees, which will be determined at the compliance hearing herein.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, C & K Insulation, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Refusing to consider for hire, or refusing to hire, Paul Johnson, Keith Wagner or Thomas Davitt because of their positions with, or activities on behalf of, the Union or other unions.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of the date of this Order, make whole Paul Johnson, Keith Wagner and Thomas Davitt for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Binghamton, New York facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____

Joel P. Biblowitz
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire, or refuse to consider for hire, employee-applicants because of their support for, or position with, Heat and Frost Insulators and Asbestos Workers Local #38, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Paul Johnson, Keith Wagner and Thomas Davitt for any loss that they suffered as a result of our failure to hire them or to consider them for hire.

C & K INSULATION, INC.
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.